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February 10, 2006

DOCKET FILE COPY ORIGINAL

VIA FEDEX

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, Maryland 20743

Re: Initial Comments in MB Docket No. 05-311

Dear Ms. Dortch:

Attached for filing *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, are an original and four (4) copies of the Initial Comments of the Burnsville/Eagan Telecommunications Commission; the City of Minneapolis, Minnesota; the North Metro Telecommunications Commission; the North Suburban Communications Commission; and the South Washington County Telecommunications Commission (the "Comments").

I have also enclosed an additional copy of the Comments. Please date-stamp that copy and return it to me in the enclosed postage-prepaid envelope.

Very truly yours,
BRADLEY & GUZZETTA, LLC

Stephen J. Guzzetta

Attachments

No. of Copies rec'd 0+4
List A B C D E

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†Also admitted in Wisconsin
*Also admitted in Massachusetts and the District of Columbia

Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Implementation of Section 621(a)(1) of	)	
the Cable Communications Policy Act of 1984	)	MB Docket No. 05-311
as amended by the Cable Television Consumer	)	
Protection and Competition Act of 1992	)	

INITIAL COMMENTS OF THE BURNSVILLE/EAGAN TELECOMMUNICATIONS COMMISSION; THE CITY OF MINNEAPOLIS, MINNESOTA; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; AND THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION

Original

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February 10, 2006

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SUMMARY

The Burnsville/Eagan Telecommunications Commission, the City of Minneapolis, Minnesota, the North Metro Telecommunications Commission, the North Suburban Communications Commission and the South Washington County Telecommunications Commission (the "LFAs") are local government units that administer and enforce cable franchises, receive and review franchise applications, and in some cases, award cable franchises. The LFAs therefore have a vested interest in local cable franchising, and would be significantly impacted by any action taken by the Federal Communications Commission ("the Commission" or "the FCC") pursuant to its November 18, 2005, Notice of Proposed Rulemaking ("NPRM").

The FCC Lacks Authority to Preempt or Interfere with Local Franchising

The LFAs do not believe that the FCC has the authority to preempt or modify local cable system franchising procedures and requirements. This is due, in part, to the fact that Congress designated the courts as the fora where franchising disputes are to be heard. Moreover, Congress has not explicitly empowered the FCC to interfere with or to preempt local franchising processes in Section 621(a) of the Cable Communications Policy Act of 1984, as amended (the "Cable Act"), or elsewhere in the Communications Act of 1934, as amended (the "Communications Act"). In other words, there is no clear and unmistakable Congressional intent to preempt local franchising requirements, processes and procedures. Consequently, the FCC may not rely on § 621(a)(1) to eviscerate local franchising processes (either prior to or after final action has been taken on a competitive franchising application). Nor may the FCC expand the scope of § 621(a)(1) beyond the plain language adopted by Congress.

The Commission also relies on Title I of the Communications Act for authority to preempt local franchising processes and procedures. However, Title I of the Communications

Act cannot function as an independent source of authority, since any authority granted therein must be rooted in specific substantive provisions elsewhere in the Communications Act. As indicated above, nowhere in the Communications Act is the FCC explicitly empowered to restrict or revise local franchising processes. If Congress had intended to enable the FCC to intrude into a fundamental area of state/local sovereignty, like franchising, it would have had to make its intent clear and unmistakable – it did not do so. To the contrary, Congress has made clear that it intended to preserve local franchising. Because public property is at stake, any action by the FCC to preempt or restrict local franchising would likely raise Fifth Amendment issues.

Local Franchising Promotes Federal Objectives

The Cable Act sets forth a number of Congressional objectives for cable communications, including: the promotion of competition; ensuring that cable systems are responsive to the needs of the local community; and assuring that cable communications provide the widest possible diversity of information sources and services to the public. Local franchising serves and promotes these objectives. For instance:

- The LFAs' franchises are non-exclusive, and contain level playing field requirements which encourage fair competition. Contrary to industry assertions, there is nothing inherently anti-competitive about level playing field provisions which afford local governments the flexibility to establish competitively neutral franchise commitments.
- The LFAs' franchises contain requirements for PEG capacity and institutional networks which advance Congress' desire for diverse information sources.
- The LFAs' franchises are specifically tailored to meet the needs and interests of the community. A one-size-fits-all approach to franchising would invariably result in legitimate and lawful needs and interests going unmet in some cases.

In addition, the LFAs' franchises support the growth of cable systems through reasonable system build-out requirements that also satisfy Congress' directive to prevent economic redlining. Contrary to telephone industry claims, local build-out requirements should not be barrier to

entry, because the Cable Act obligates local franchising authorities to give new entrants a reasonable period of time to build their system throughout the franchise area.

The Local Franchising Process Enhances Competition and Creates Opportunities

The LFAs support fair competition. Indeed, the LFAs encourage wireline competition in the delivery of video programming because it has been shown to reduce rates. In Minnesota, competition among providers is encouraged by the streamlined franchising process set forth in state law, which spells out minimum franchise application contents and specifies minimum local franchise requirements. Given the existence of clearly defined state franchise procedures, the entire local franchising process can be completed in a relatively short period of time, particularly if the applicant is reasonable and cooperative. Market entry is also streamlined by the existence of municipal joint powers commissions. These commissions frequently review franchise applications and negotiate franchises on behalf of their member cities. Consequently, a franchise applicant can submit a single application covering numerous jurisdictions, and negotiate multiple franchises with a single entity. The success of local franchising practices in Minnesota is underscored by the fact that forty-seven communities have awarded competitive cable franchises.

Aside from establishing certain procedures and requirements for local cable franchising, Minnesota law has established limited market entry requirements for telecommunications service providers. For instance, under state law, local governments cannot franchise telecommunications systems and possess limited right-of-way management authority over telecommunications right-of-way users. Accordingly, advanced broadband networks can be constructed and operated without invoking the local cable franchising process (provided video service is not offered and cable television-specific equipment and facilities are not installed). Thus, local cable franchising cannot be said to impede the deployment of advanced broadband networks in Minnesota.

It should also be noted that video competition is in fact developing, consistent with federal goals. In this regard, competitive franchises are being awarded by a number of local governments around the country, which suggests that true barriers to entry do not exist. In the event that a franchise application is denied, Congress has specified a clear judicial path for review of the franchising authority determination. Far from being a barrier to entry, the franchise process ensures the needs and expectations of all parties are met and the rights of all participants are protected.

Conclusion

Local cable franchising is enabling video competition around country, and in so doing is promoting the deployment of advanced broadband networks. Thus, the dual regulatory scheme created by Congress is working, and should not be disturbed. Abstention is particularly appropriate in this case because there is no incontrovertible evidence showing that local franchising is inhibiting multichannel video distribution competition. As importantly, the FCC possesses no plenary authority to preempt or restrict local franchising processes under Title I or Title VI of the Communications Act. If the Commission was to supersede or modify local franchising processes and procedures, Fifth Amendment issues would likely be raised.

Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)))))	MB Docket No. 05-311

INITIAL COMMENTS OF THE BURNSVILLE/EAGAN TELECOMMUNICATIONS COMMISSION; THE CITY OF MINNEAPOLIS, MINNESOTA; THE NORTH METRO TELECOMMUNICATIONS COMMISSION; THE NORTH SUBURBAN COMMUNICATIONS COMMISSION; AND THE SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION

I. INTRODUCTION.

These comments are filed on behalf of the City of Minneapolis, Minnesota and the following municipal joint powers commissions in the above-captioned proceeding: the Burnsville/Eagan Telecommunications Commission (a municipal joint powers commission consisting of the cities of Burnsville and Eagan, Minnesota); the North Metro Telecommunications Commission (a municipal joint powers commission consisting of the cities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park, Minnesota); the North Suburban Communications Commission (a municipal joint powers commission consisting of the cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North Oaks, Roseville, St. Anthony and Shoreview, Minnesota); and the South Washington County Telecommunications Commission (a municipal joint powers commission consisting of the municipalities of Woodbury, Cottage Grove, Newport, Grey Cloud

Island Township and St. Paul Park, Minnesota) (collectively, the "LFAs").[1] The LFAs represent twenty-five cities and townships in Minnesota, with a combined population of over 750,000. Comcast of Minnesota, Inc., Comcast of Minnesota/Wisconsin, Inc. and Time Warner Cable, Inc. are the incumbent wireline cable service providers in the franchise areas represented by the LFAs.[2]

The LFAs are generally responsible for administering and enforcing their local cable franchises. The LFAs also receive and resolve consumer complaints regarding cable service and cable modem service. In addition, the LFAs are empowered to receive and review applications for additional franchises and to negotiate the terms and conditions of competitive franchises. Under applicable state law, the City of Minneapolis, Minnesota, and the South Washington County Telecommunications Commission are authorized to award or deny franchises permitting the use of public rights-of-way by cable system operators.

Many of the LFAs operate video production facilities, and are actively involved in producing government access programming and/or making studios, edit suites and equipment available for public access programming. Additionally, several of the LFAs oversee and/or operate institutional networks which connect government facilities and are utilized for advanced video, voice and data applications. Thus, the LFAs have a significant interest in cable system franchising, and would be directly affected by any action the Federal Communications

[1] With the exception of the South Washington County Telecommunications Commission, the member cities of the various joint powers commissions award cable franchises to applicants. The joint powers commissions are generally responsible for enforcing and administering their member cities' cable franchises. The South Washington County Telecommunications Commission, however, is also empowered to award cable franchises on behalf of its member cities.

[2] Comcast of Minnesota, Inc., and Comcast of Minnesota/Wisconsin, Inc., are referred to in these comments as "Comcast." Time Warner Cable, Inc. is referred to herein as "Time Warner Cable."

Commission (the "Commission" or the "FCC") might take pursuant to its November 18, 2005, Notice of Proposed Rulemaking ("NPRM").[3]

The LFAs' comments will address the questions and issues raised in ¶¶ 10, 12, 14-17, 19-20 and 23 of the FCC's NPRM. As a general principle, the LFAs do not believe the FCC possesses the authority to preempt or modify local cable system franchising procedures and requirements pursuant to: (i) Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 and the Telecommunications Act of 1996 (the "Cable Act"), 47 U.S.C. § 541(a)(1), as amended; (ii) Section 1 of the Communications Act of 1934, as amended (the "Communications Act"), 47 U.S.C. § 151; or (iii) Section 4(i) of the Communications Act, 47 U.S.C. § 154(i). If the Commission was to preempt or otherwise alter local franchising procedures and requirements based on the foregoing statutory provisions, the LFAs believe significant Constitutional issues would be raised. Moreover, if the Commission adopts preemptive regulations based on speculative, ambiguous and unsupported comments from regional bell operating companies, such rules would necessarily be arbitrary and capricious.

As a matter of sound public policy, the LFAs support fair competition and the flexibility afforded by current law to ensure that local needs and interests are met through the local franchising process, consistent with Congressional intent. To date, there is no concrete, incontrovertible evidence that proves franchising inhibits or otherwise bars the development of multichannel video competition and the deployment of advanced communications networks.

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[3] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, MB Docket No. 05-311 (Rel. Nov. 18, 2005).

Indeed, the cable television industry has thrived under the existing franchising scheme and has spent billions of dollars upgrading its networks.[4]

There is substantial evidence that franchising of cable systems brings significant benefits to local communities and their residents. For example, public, educational and governmental ("PEG") access channel capacity dedicated in franchise agreements (i) ensures that governmental institutions can communicate effectively with their constituents, (ii) provides transparency in the policy-making process, (iii) makes informative and unique programming accessible to a broad audience, and (iv) allows diverse viewpoints to be exchanged effectively. Likewise, institutional networks constructed pursuant to local franchises enable local governments and educational institutions to communicate with each other and the public in a secure, efficient, effective and economical manner.

In the same vein, all of the LFAs' franchises contain customer service standards with which the franchised cable operator must comply. These standards, which are generally based on the FCC's minimum customer service regulations, ensure that Comcast and Time Warner Cable provide quality service and treat customers fairly. The need for customer service standards, and local enforcement of those standards, is underscored by the number and nature of subscriber complaints received by the LFAs. If the FCC was to take on the task of addressing subscriber complaints on a national basis, the administrative burden would be enormous. In addition to customer service standards, the LFAs' franchises contain build-out requirements for the entire franchise area (subject to certain density requirements). These build-out provisions help to ensure that cable service, and the other services offered over cable systems, are available

[4] Cable operators spent nearly $100 billion between 1996 and mid-2005 upgrading their systems, which included the introduction of fiber-optics and increased capacity. *See* National Cable & Telecommunications Association, *2005 Mid-Year Industry Overview* 7 (2005), *available at* www.ncta.com.

to as many people as possible. By preventing redlining, the LFAs are furthering the federal goal that advanced services and capabilities *should be available to all, without regard to income.*[5]

Finally, as a general matter, the LFAs' cable franchises delineate the terms and conditions under which Time Warner Cable and Comcast may use public rights-of-way. Local right-of-way requirements are a fundamental and extremely significant exercise of state and local sovereignty and implicate local police powers. Indeed, it is through right-of-way management provisions in local cable television franchises (and the codes and standards incorporated into cable franchises) that the LFAs are able to protect public health, safety and welfare by regulating the local conduct of cable operators in local streets and on public property.

II. LOCAL CABLE SYSTEM FRANCHING IS CONSISTENT WITH AND PROMOTES FEDERAL OBJECTIVES.

A. The LFAs' Local Franchises Reflect and Promote Federal Objectives for Cable Systems and Broadband Deployment.

Paragraph 10 of the NPRM queries "whether in awarding franchises, LFAs are carrying out legitimate policy objectives allowed by the [Communications] Act or are hindering the federal policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment." In responding to this query, it is important to emphasize at the outset that the LFAs support and encourage fair competition in the delivery of multichannel video programming and the prompt deployment of advanced broadband networks consistent

[5] *See, e.g.*, Section 621(a)(3) of the Cable Act, 47 U.S.C. § 541(a)(3). The legislative history for § 541(a)(3) states that: "cable systems will not be permitted to 'redline' (the practice of denying service to lower income areas). Under this provision, a franchising authority in the franchising process shall require the wiring of all areas of the franchise area to avoid this type of practice." H.R. Rep. No. 934, 98th Cong. 2nd Sess. 59, *reprinted in* 1984 U.S.C.C.A.N. 4655, 5696 (1984). *See also Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540 (2004) ("Section 706 of the Telecommunications Act directs both the Commission and the states to encourage deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis.").

with applicable federal, state and local law.[6] It is also important to recognize that the promotion of competition in cable communications[7] is but one fundamental purpose of the Cable Act and the Communications Act. Other significant purposes of the Cable Act articulated by Congress include: establishing "franchise procedures and standards . . . which assure that cable systems are responsive to the needs and interests of the local community;"[8] and assuring "that cable communications provide the widest possible diversity of information sources and services to the public . . . ."[9] Congress concluded that all of these goals were best met through the local franchising process (with certain clearly defined federal limitations and mandates). Indeed, in enacting the Cable Act, Congress specifically stated that it was preserving existing cable franchising authority.[10]

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[6] *See, e.g.*, 47 U.S.C. § 541(a)(3) (prohibiting economic redlining), 47 U.S.C. § 541(a)(4)(A) (requiring a franchising authority to allow a new entrant's cable system a reasonable period of time to serve all households in the franchise area), and Minn. Stat. § 238.08, subd. 1(b) (generally specifying that no municipality can grant an additional cable service franchise on terms more favorable or less burdensome than those in the existing franchise with respect to area served).

[7] *See* 47 U.S.C. § 521(6).

[8] 47 U.S.C. § 521(2).

[9] 47 U.S.C. § 521(4).

[10] *See* H.R. Rep. No. 934 at 26, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4663 (1984) (Congress intended that "the franchise process take place at the local level where [local] officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."). Congress also stated that "the ability of a local government entity to require particular cable facilities (and to enforce requirements in the franchise to provide those facilities) is essential if cable systems are to be tailored to the needs of each community [and the Cable Act] explicitly grants this power to the franchising authority." *Id.* According to the House Report on H.R. 4103, whose terms were later incorporated into the Cable Act, "cable television has been regulated at the local government level through the franchise process . . . . H.R. 4103 establishes a national policy that clarifies the current system of local, state and federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation . . . . The bill establishes franchise procedures and standards to . . . assure that cable systems are responsive to the needs and interests of the local communities they service." H.R. Rep. No. 934 at 19, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656 (1984).

The non-exclusive cable franchises awarded by the LFAs or their member cities clearly advance the many federal policy objectives established by Congress. As indicated above, one of Congress' objectives in enacting the Cable Act is to promote the dissemination of diverse information.[11] The LFAs' franchises further this objective. All of the franchises, for example, contain requirements for PEG access channel capacity.[12] Such capacity can be required in accordance with Section 611(b) of the Cable Act, 47 U.S.C. § 531(b).[13] In this regard, the North Suburban Communications Commission franchises include an obligation for twelve 6 MHz PEG channels.[14] In the North Metro Telecommunications Commission franchise areas, Comcast agreed to dedicate six 6 MHz channels for PEG access purposes,[15] while in the South Washington County Telecommunications Commission franchise area five 6 MHz channels are dedicated for PEG access purposes.[16] The LFAs and/or the PEG access channel managers utilize this capacity as outlets for video programming that typically would not otherwise be disseminated or for the expression of unique viewpoints. Indeed, the public access channels

[11] *See, e.g.*, H.R. Rep. No. 934 at 30, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (1984) ("One of the greatest challenges over the years in establishing communications policy has been assuring access to the electronic media by people other than the licensees or owners of those media. The development of cable television, with its abundance of channels, can provide . . . the meaningful access that . . . has been difficult to obtain.").

[12] One of the primary purposes of PEG access is to afford "groups and individuals who generally have not had access to electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 934 at 30, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (1984).

[13] *See also* Minn. Stat. § 238.084, subd. 1(z) (requiring a franchise provision which establishes the minimum number of access channels that a franchised cable operator must make available).

[14] *See* Affidavit of Coralie A. Wilson at 2, attached hereto as Exhibit A.

[15] *See, e.g.*, § 6.1.2 of the Blaine, Minnesota franchise ordinance, *available at* www.northmetro15.com/commission/franchise.htm.

[16] *See* § 6.1 of the South Washington County Telecommunications Commission cable franchise. The South Washington County Telecommunications Commission franchise is available at www.swctc.org/documents/swctc%20franchise%20adopted%20103002.pdf.

provided pursuant to the LFAs' franchises provide an open forum for virtually any type of lawful speech or expression.

The public makes significant use of available public access channel capacity. For instance, in the North Suburban Communications Commission franchise areas, approximately 246 hours of original programming is cablecasted on four public access channels each month.[17] Overall, a total of about 1,558 hours of public access programming is cablecasted each month on the North Suburban Communications Commission public access channels.[18] Citizens and staff in the North Metro Telecommunications Commission franchise areas also produce an impressive amount of public access programming each year. In 2005, for example, an average of 100 hours of new public access programming was cablecasted each month on two public access channels.[19] In December of 2005, a total of 2,022 hours of public access programming was cablecasted.[20] All of these public access productions are made possible by hundreds of volunteers that produce and edit programming on a monthly basis.[21] As is evident from the amount of programming produced, the LFAs' public access channels function as a vibrant video "soapbox" for independent expression in the community.[22]

The public schools in the LFAs' franchise areas also make use of the PEG capacity provided pursuant to local cable television franchise agreements. Many local school districts use their channel capacity to cablecast board meetings, sporting events, concerts, and special events,

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[17] *See* Affidavit of Coralie A. Wilson at 2.
[18] *Id.* at 2-3.
[19] *See* Affidavit of Heidi Arnson at 2, attached hereto as Exhibit B.
[20] *Id.*
[21] *See* Affidavit of Coralie A. Wilson at 3 and Affidavit of Heidi Arnson at 2.
[22] H.R. Rep. No. 934 at 30, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (1984) ("Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet . . . .").

such as award ceremonies and graduations.[23] The Mounds View School District, for example, produces an average of eight hours of original programming each month, and cablecasts 296 hours of repeat programming on a monthly basis.[24] The Roseville Area School District produces two or three programs a week during the school year.[25] Moreover, all of the educational access channels in the North Suburban Communications Commission franchise areas are programmed twenty-four (24) hours a day.[26] As with public access programming, much, if not all, educational access programming would not have an outlet (and probably would not be produced at all) but for the existence of PEG channel capacity included in local franchise agreements. This programming is an important source of information and entertainment, and allows public school districts to communicate with parents and students efficiently over a wide geographic area.

All of the LFAs have reserved channel capacity for governmental access use.[27] This capacity is primarily used to cablecast: (i) city council meetings and other municipal meetings (*e.g.*, planning commission meetings and parks and recreation commission meetings); (ii) election coverage (*e.g.*, candidate profiles and fora); (iii) local parades and events; (iv) talk shows with local officials and residents; (v) local debates; and (vi) locally produced documentaries.[28] As is evident from the variety of programming produced, government access channels are used to show local government at work, to provide transparency and accountability to constituents, to form a sense of cohesive community and civic pride and to communicate with

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[23] *See* Affidavit of Coralie A. Wilson at 3 and Affidavit of Heidi Arnson at 3.
[24] *See* Affidavit of Coralie A. Wilson at 3.
[25] *Id.*
[26] *Id.*
[27] *See, e.g.*, the Affidavit or Coralie A. Wilson at 3-4, § 6.1 of the South Washington County Telecommunications Commission franchise, § 6.2.1 of the North Metro Telecommunications Commission franchises, and the Affidavit of Heidi Arnson at 2-3.
[28] *See* Affidavit of Coralie A. Wilson at 3-4 and Affidavit of Heidi Arnson at 2-3.

local residents.[29] The LFAs' government access channels are used frequently, with approximately 1,051 hours of government access programming cablecasted each month on the discrete government access channels in the North Suburban Communications Commission franchise areas.[30] According to the North Metro Telecommunications Commission, there were approximately 5,717 government access program playbacks last year on the member cities' discrete government access channels.[31] The South Washington County Telecommunications Commission cablecasts twenty-four (24) government meetings each month and produces 175 original government programs each year. During local and state elections, candidate profiles are taped, candidate fora are cablecasted live, and live election results are reported on the government access channel.

In addition to PEG access channel capacity, the LFAs may require the construction of an institutional network and may mandate that capacity on the institutional network be designated for governmental and educational use.[32] All of the LFAs' franchises contain enforceable requirements for the construction and provision of an institutional network and for the use of capacity on the institutional network.[33] The technical specifications and characteristics of the individual networks may vary, but the fundamental purpose of each institutional network is the

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[29] H.R. Rep. No. 934 at 30, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (1984) (One of the purposes of government access channel capacity is "showing the public local government at work.").

[30] *See* Affidavit of Coralie A. Wilson at 3-4.

[31] *See* Affidavit of Heidi Arnson at 3.

[32] *See, e.g.*, 47 U.S.C. § 531(b) (specifying that channel capacity on institutional networks may be dedicated for educational and governmental use) and 47 U.S.C. § 544(b) (stating that local franchising authorities may establish requirements for cable-related facilities and equipment). *See also* H.R. Rep. No. 934 at 68, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4705 (1984) ("Facility and equipment requirements may include requirements which relate to channel capacity; [and] system configuration and capacity, including institutional and subscriber networks . . . .").

[33] *See, e.g.*, § 7 of the South Washington County Telecommunications Commission franchise, Affidavit of Coralie A. Wilson at 4, § 7 of the North Metro Telecommunications Commission member city franchises and Affidavit of Heidi Arnson at 3.

same: to permit local governments to communicate effectively and efficiently both internally (*e.g.*, with other municipal departments) and externally (*e.g.*, with other political subdivisions, businesses and residents) using a variety of voice, video and data applications.

The North Suburban Communications Commission manages the institutional network for its member cities and provides and maintains necessary electronics.[34] According to Coralie A. Wilson, Executive Director of the North Suburban Communications Commission, the institutional network serving the member cities functions as a critical transport platform for data between municipalities, including the distribution of vital geographic information system data.[35] Several member cities also use the institutional network for backbone transport of VoIP communications. With regard to video, the institutional network enables the North Suburban Communications Commission to originate programming from remote locations and permits the sharing of video programming with other communities through interconnection links.[36] There are currently over eighty (80) institutions connected to the institutional network serving the North Suburban Communications Commission member cities.[37] The institutional network constructed for the North Metro Telecommunications Commission's member cities currently connects fifty-four (54) sites, and is used for fire department training and data transmission, among other things.[38] It goes without saying that institutional networks allow the LFAs to realize cost savings by enabling them to reduce or eliminate their reliance on leased telecommunications lines. Institutional networks also allow local governments to quickly and easily disseminate diverse information to local residents and to the world through Internet

[34] *See* Affidavit of Coralie A. Wilson at 4.
[35] *Id.*
[36] *Id.*
[37] *See id.* at 4 and Attachment 1.
[38] *See* Affidavit of Heidi Arnson at 3.

connections and publicly available databases. This capability is consistent with Congress' goal of assuring that cable communications provide the widest possible diversity of information sources to the public.

Besides operating institutional networks, many local franchising authorities operate local emergency alert systems. These systems, which can be activated by local governments, are developed pursuant to local cable franchises, in cooperation with franchised cable operators, and typically would not exist but for local franchise requirements. Unlike national, state and regional emergency alert systems, local emergency alert systems allow local governments to utilize a cable system (by overriding audio and/or video on the system) to inform the public of localized emergencies that might not warrant coverage on metropolitan broadcast networks or require a more global emergency response. The events of September 11, 2001, underscored the fact that local governments play an important role in homeland security and disaster management and are often first responders to natural disasters and terrorist attacks. The development of emergency alert systems enhances the ability of local governments to effectively carry out their important public safety mission. Thus, through local franchising, local governments can ensure that cable systems provide necessary emergency alert capabilities, consistent with Congress' goal that cable systems should be responsive to the needs and interests of the local community.[39]

In Section 601(2) of the Cable Act, 47 U.S.C. § 521(2), Congress manifested its desire to "encourage the growth and development of cable systems." The LFAs' have promoted the growth and development of cable systems in their communities by, among other things, negotiating system build-out requirements with their incumbent cable operators. These requirements generally obligate Comcast and Time Warner Cable to construct their systems

[39] *See* § 602(2) of the Cable Act, 47 U.S.C. § 521(2).

throughout the entire franchise area (either at standard installation charges or with a financial contribution from subscribers, depending on the housing density of the location at issue).[40] This approach prevents economic redlining, consistent with 47 U.S.C. § 541(a)(3), and ensures that a community's cable system is capable of growing and adapting as the franchise area develops and the services available over the cable system continue to develop.[41] It is important to note that the LFAs' build-out requirements balance the benefits of universal coverage with the costs of constructing facilities in areas with a small and/or scattered population or challenging geographical features. Placing undue economic burdens on cable operators does not serve the public interest because cable rates will inevitably rise, and the cable operator's ability to continuously upgrade its system and to roll out new and advanced services will be inhibited. Given the importance of advanced cable systems in today's information economy, it is important that local franchising authorities have significant flexibility to encourage the construction and growth of cable systems in a manner that satisfies their needs and interests and reflects their particular social and economic circumstances.

In its NPRM, the Commission asks whether build-out requirements create barriers to entry for facilities-based providers of telephone and/or broadband services.[42] Many of these facilities-based providers, however, have already deployed facilities throughout the communities they serve. Thus, build-out requirements will either not be an issue, because the provider is

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[40] *See, e.g.*, § 4.4 of the North Metro Telecommunications Commission member city franchises, and § 4.3 of the South Washington County Telecommunications Commission franchise.

[41] The legislative history for § 541(a)(3) states that: "cable systems will not be permitted to 'redline' (the practice of denying service to lower income areas). Under this provision, a franchising authority in the franchising process shall require the wiring of all areas of the franchise area to avoid this type of practice." H.R. Rep. No. 934, 9th Cong. 2nd Sess. 59, *reprinted in* 1984 U.S.C.C.A.N. 4655, 5696 (1984). Local concerns about economic redlining are warranted given statements from AT&T (formerly SBC) that most "low value" consumers will be bypassed by its upgraded networks. *See, e.g.*, NPRM at ¶ 6.

[42] NPRM at ¶ 23.

already able to serve most if not all households in a given community, or a minor issue, because only an insignificant amount of additional plant construction may be necessary to satisfy a build-out requirement. To prevent unreasonable build-out demands, the Cable Act specifies that *local franchising authorities* must give new entrants "a reasonable period of time to become capable of providing cable service to all households in the franchise area . . . ."[43] At the same time, the Cable Act mandates that *local franchising authorities* establish build-out requirements which "assure access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[44] Accordingly, the Cable Act clearly empowers local franchising authorities, not the Commission, to implement the federal requirement to prohibit economic redlining and the federally-mandated obligation to give a new market entrant a reasonable period of time in which to construct its cable system. Congress could have, but did not, create a role for the Commission in these areas, and any assertion of jurisdiction by the FCC over build-out requirements would be unsupported by the text of the Cable Act and Congressional intent and would, therefore, be arbitrary and capricious.

Industry and Commission fears about local build-out requirements are misplaced. Local franchising authorities must establish reasonable build-out requirements consistent with § 541(a)(4)(A) and state law. However, what is reasonable in one municipality may not be reasonable in another, depending on a variety of factors including (but not limited to): (i) the facilities an applicant already has in place; (ii) local population demographics; (iii) housing density patterns; and (iv) local geography. A federal maximum and/or minimum system build-out timeframe for competitive franchise applicants could therefore compel a local franchising

[43] 47 U.S.C. § 541(a)(4)(A).
[44] 47 U.S.C. § 541(a)(3).

authority to act unreasonably and to cause a violation of § 541(a)(4)(A). On the other hand, the current practice of allowing local franchising authorities to tailor build-out requirements[45] to specific circumstances, because a "reasonable period of time" to construct or expand a cable system will vary from provider to provider and community to community, furthers Congress' complementary objectives of promoting competition, preventing economic redlining, and ensuring that local needs and interests are satisfied.

Although not listed in Section 601 as "purposes" of the Cable Act, the establishment and enforcement of customer service standards have been delineated by Congress as a fundamental role for local franchising authorities. In fact, Section 632(a)(1) of the Cable Act, 47 U.S.C. § 552(a)(1), specifies that a local franchising authority may "establish and enforce . . . customer service requirements of the cable operator . . . ." The enactment of § 552(a)(1) makes clear that Congress recognized local problems should be handled and resolved locally, while at the same time authorizing the FCC to establish uniform "minimum" standards that local franchising authorities and cable operators can utilize. Any other approach would create tremendous administrative burdens for the FCC, since there are thousands of cable systems across the country which generate subscriber complaints. Congress also preserved the ability of state and local governments to adopt customer service requirements consistent with federal law.[46] Such requirements may exceed the FCC's national "minimum" customer service regulations or address matters not covered by FCC regulations.[47] It is therefore evident that Congress intended to provide local franchising authorities with the ability to protect consumers from inept, unlawful or unscrupulous cable operator behavior.

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[45] These requirements must, of course, be consistent with state law.
[46] *See generally* § 632(d) of the Cable Act, 47 U.S.C. § 552(d).
[47] *See* § 632(d)(2) of the Cable Act, 47 U.S.C. § 552(d)(2).

In accordance with § 552 and applicable law, the LFAs negotiated customer service requirements in their franchises.[48] In most cases, these requirements are based on the FCC's "minimum" customer service standards. The customer service requirements are invoked and enforced, as appropriate, when the LFAs receive a complaint. The LFAs typically advertise a telephone number and/or address (*e.g.*, on subscriber bills and/or the Internet) that can be used to file a complaint. An employee is usually charged with investigating and resolving all complaints that are received. In many cases, complaints are filed after a subscriber has been unable to satisfactorily resolve a complaint with their cable operator directly, so the LFAs are frequently a regulator and problem solver of last resort. Because one or more persons are typically responsible for addressing subscriber complaints within a single franchise area, the LFAs are able to respond quickly and thoroughly. That would not likely be the case if cable complaints were to be handled on a national basis by a single federal agency or at the state level. Consumers might therefore be left unprotected if local enforcement of customer service standards is eliminated.

As is evident from the discussion above, all of the LFAs' franchises are the product of a local franchising process which considered local cable-related needs and interests. The resulting franchises are, therefore, tailored to meet the specific needs and interests of each community or group of member cities and their constituents, including (but not limited to) subscribers, local program producers, educational institutions and governmental institutions.[49] Consequently, the LFAs' franchises are not identical (although franchises negotiated by joint powers commissions

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[48] *See, e.g.*, § 5.5 of the North Metro Telecommunications Commission member city franchises, and § 5.5 of the South Washington County Telecommunications Commission franchise.

[49] It should be noted, however, that Minnesota state law does establish certain uniform minimum franchise requirements. *See* Minn. Stat. § 238.084. That said, local cable-related needs and interests must still be met. *See, e.g.*, Minn. Stat. § 238.084, subd. 4.

on behalf of their member cities are virtually identical). The existence of diversity in franchising reflects Congress' goal that "cable systems are responsive to the needs and interests of the local community."[50] While some regional bell operating companies may argue that this diversity is a "barrier" to market entry, the LFAs posit that diversity promotes competition by ensuring the social obligations taken on by cable operators, in return for the use of scarce and valuable public rights-of-way, are commensurate with the needs and interests articulated by a community. A one-size fits all approach to franchising will invariably result in legitimate and lawful local needs and interests going unmet in certain cases (in contravention of Congressional intent and the Cable Act)[51] and in other cases could result a cable operator assuming social obligations (and associated costs) which are unnecessary, in light of existing cable-related needs and interests.

When the Commission queries in ¶ 13 of the NPRM whether cable service requirements should vary greatly from jurisdiction to jurisdiction, it is really asking whether local franchising authorities should be able to require cable system operators to meet local cable-related needs and interests. The answer is emphatically "yes." When Congress enacted the Cable Act, it clearly intended that cable operators would be required to meet local needs and interests[52] and the plain language of the Cable Act implements Congress' manifest intent.[53] The need for local flexibility

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[50] *See* § 601(2) of the Cable Act, 47 U.S.C. § 521(2).

[51] *See, e.g.*, § 621(a)(4)(B) of the Cable Act, 47 U.S.C. § 541(a)(4)(B) (providing that local franchising authorities "may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support . . .").

[52] *See, e.g.*, H.R. Rep. No. 934 at 24 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4661 (wherein Congress said it intended that: "the franchise process take place at the local level where [local] officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs").

[53] *See, e.g.*, 47 U.S.C. § 531(b) (authorizing local franchising authorities to require channel capacity on a cable system to be dedicated for public, educational and governmental use), 47 U.S.C. § 541(a)(4)(B) (permitting local franchising authorities to require adequate assurance that cable operators seeking a franchise will provide adequate public, educational, and governmental

in franchising and for continued local authority to require and/or negotiate important social obligations in franchise documents is as important, if not more important, today than it was in 1984. As the ownership and control of communications facilities and media content have become more consolidated and centralized in recent years, it is only through customized franchise requirements that local concerns about public safety (*e.g.*, safety issues posed by system construction and extensions and damage to public rights-of-way), economic redlining (local government knows best about what requirements for building out an advanced cable system are most reasonable, given the particular demographic and topographical features of the community and any limitations imposed by state law) and content diversity (*e.g.*, ensuring a diversity of viewpoints on a system by dedicating adequate PEG capacity) can be adequately addressed.

Before usurping municipal franchising policies, procedures and requirements, and upsetting the longstanding dual regulatory scheme that has permitted the cable industry to thrive, while at the same time supporting localism, the FCC must be certain that a concrete and intractable problem exists. The basis for the NPRM seems to be based primarily on complaints from Verizon and AT&T (formerly SBC) and other regional bell operating companies.[54] However, the accusations made by those companies are generally speculative, ambiguous and unsupported. The facts show that local franchising has encouraged the widespread deployment of advanced cable systems around the nation. Nationally, 105 million households were passed

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access channel capacity, facilities, or financial support), 47 U.S.C. § 541(a)(4)(C) (permitting local franchising authorities to require adequate assurance that cable operators seeking a franchise have the financial, technical, or legal qualifications to provide cable service), 47 U.S.C. § 544(b) (authorizing local franchising authorities to establish facilities and equipment requirements in requests for proposals for franchises), and 47 U.S.C. § 546(a)(1) (permitting local franchising authorities to identify the community's future cable-related needs and interests).

[54] *See, e.g.*, NPRM at ¶¶5-6.